

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GAIL MEYERS; STEPHANIE
CHISSUS, individually

NO: 1:14-CV-3159-RMP

Plaintiffs,

v.

ORDER GRANTING IN PART
DEFENDANT YELLOW CHURCH'S
RENEWED MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM

YELLOW CHURCH CAFÉ, LLC; a
Washington corporation; RYALEX,
INC., a Washington corporation,

Defendants.

BEFORE THE COURT is Defendant Yellow Church Café, LLC's Renewed Motion to Dismiss, ECF No. 34. The Court has reviewed the motion, the response memorandum, ECF No. 35, supporting declarations, the reply memorandum, ECF No. 39, supporting declarations, the Court's previous Order Denying In Part and Granting In Part various pleadings, ECF No. 66, and Order Granting in Part and Denying in Part Defendant's prior motion to dismiss, ECF No. 31. Defendant Yellow Church Café, LLC incorporated its previous arguments set out in ECF No. 14 in the instant motion to dismiss. ECF No. 34.

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1 Plaintiffs' counsel was granted leave to withdraw as counsel on August 8,
2 2016, ECF No. 52, and the Court has stricken any pleadings filed by Plaintiffs'
3 counsel after she withdrew as the attorney of record. ECF No. 53-56. Several
4 plaintiffs moved to dismiss their claims with prejudice, which the Court granted,
5 which leaves only Plaintiffs Stephanie Chissus and Gail Meyers, proceeding *pro*
6 *se*, individually, in this action.

7 Yellow Church Café LLC is a privately held limited liability company
8 consisting of two members. ECF No. 20 at 2. Oscar Guitron and his wife, Shonda
9 Shawver, are the current owners of Yellow Church Café, LLC. ECF No. 42,
10 Shawver Decl. Ex. A at 10; ECF No. 20 at 2. Oscar Guitron and Shonda Shawver
11 formed Yellow Church Café, LLC in October 2013 for the purpose of purchasing
12 the assets of the Yellow Church Cafe restaurant owned and operated by Ryalex,
13 Inc. ECF No. 42, Shawver Dec. ¶ 3; Shawver Dec. Ex 1.

14 Ryalex, Inc. is a privately held corporation with two shareholders. ECF No.
15 20 at 2. Gordon Wollen and his wife, Cathleen Wollen, are owners of Ryalex, Inc.
16 Shawver Decl. Ex. A at 10. Both Cathleen Wollen and Gordon F. Wollen were
17 dismissed with prejudice as defendants in the current lawsuit on April 6, 2016, *see*
18 ECF No. 19, and stricken from the amended complaint on August 4, 2016. ECF
19 No. 51 at 2. However, Ryalex, Inc., is a named defendant in the First Amended
20 Complaint for Plaintiffs' claims under Title VII. ECF No. 32 at 28. Although the
21 same counsel represents both Yellow Church Café, LLC, and co-defendant Ryalex,

1 Inc., there is no motion to dismiss Ryalex, Inc. from the Title VII claims, and there
2 has been no argument or evidence submitted on behalf of Ryalex, Inc. in the
3 pending motion to dismiss.

4 **BACKGROUND**

5 Plaintiffs allege that they were employed as servers at the Yellow Church
6 Café from fall of 2010 to August 2011. ECF No. 32 at 5. They further allege that
7 during all relevant times that they were employed by Ryalex, Inc. ECF No. 32 at
8 3. Plaintiffs, all female, allege that Mr. Canan, the head chef during the relevant
9 time period, made inappropriate comments and actions toward the Plaintiffs
10 because of their gender and/or religion. ECF No. 32 at 6-15. Plaintiffs further
11 allege that they suffered retaliation for reporting Mr. Canan's conduct. *Id.*

12 Plaintiffs allege causes of action under Title VII of the Civil Rights Act and
13 the Washington State Law Against Discrimination, RCW 49, for gender and
14 religious discrimination, sexual harassment, and retaliation. ECF No. 32 at 29-31.
15 Plaintiffs also allege Washington State common law claims for constructive
16 discharge, wrongful termination in violation of public policy, negligent hiring and
17 retention, and intentional infliction of emotional distress. *Id.*

18 Plaintiffs allege in the First Amended Complaint that the current owners,
19 Yellow Church Café, LLC, are liable "under the doctrine of employer successor
20 liability because Defendant Yellow Church Café, LLC purchased the Yellow
21

1 Church Café business from Defendant Ryalex, Inc. and continued to operate the
2 restaurant in [sic] substantially the same business.” ECF No. 32 at 3.

3 On April 1, 2016, Defendant Yellow Church Café, LLC filed a Motion to
4 Dismiss, ECF No. 14, which the Court granted in part and denied in part, stating
5 that Yellow Church could renew its motion to dismiss once adequate discovery had
6 been conducted. ECF No. 31 at 5. Yellow Church Café, LLC renews its motion to
7 dismiss because Yellow Church Café, LLC did not exist as a business entity during
8 the relevant time period when Plaintiffs were employed, and there is no basis for
9 successor liability, and Yellow Church Café, LLC is not an “employer” within the
10 terms of Title VII. ECF No. 14 at 1, 34. Yellow Church Café, LLC further argues
11 that after the Title VII claims are dismissed, this Court will lack subject matter
12 jurisdiction to hear the Washington State law claims and should decline to exercise
13 supplemental jurisdiction over the state law claims. ECF No. 14 at 2, 34.

14 **DISCUSSION**

15 The Federal Rules of Civil Procedure allow for the dismissal of a complaint
16 where the plaintiff fails to state a claim upon which relief can be granted. Fed. R.
17 Civ. P. 12(b)(6). Under Rule 12(d), “[i]f, on a motion under Rule 12(b)(6) or
18 12(c), matters outside the pleadings are presented to and not excluded by the court,
19 the motion must be treated as one for summary judgment under Rule 56.” Fed. R.
20 Civ. P. 12(d). In this case, both parties have filed materials outside the pleadings,
21 and therefore the Court treats this as a motion for summary judgment.

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1 Summary judgment is appropriate when the moving party establishes that
2 there are no genuine issues of material fact and that the movant is entitled to
3 judgment as a matter of law. Fed. R. Civ. P. 56(a). If the moving party
4 demonstrates the absence of a genuine issue of material fact, the burden then shifts
5 to the non-moving party to set out specific facts showing a genuine issue for trial.
6 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). A genuine issue of material
7 fact exists if sufficient evidence supports the claimed factual dispute, requiring “a
8 jury or judge to resolve the parties’ differing versions of the truth at trial.” *T.W.*
9 *Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

10 The evidence presented by both the moving and non-moving parties must be
11 admissible. Fed. R. Civ. P. 56(e). Evidence that may be relied upon at the
12 summary judgment stage includes “depositions, documents, electronically stored
13 information, affidavits or declarations, stipulations . . . admissions, [and]
14 interrogatory answers” Fed. R. Civ. P. 56(c)(1)(A). The court will not
15 presume missing facts, and non-specific facts in affidavits are not sufficient to
16 support or undermine a claim. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89
17 (1990).

18 In evaluating a motion for summary judgment, the Court must draw all
19 reasonable inferences in favor of the nonmoving party. *Dzung Chu v. Oracle*
20 *Corp. (In re Oracle Corp. Secs. Litig.)*, 627 F.3d 376, 387 (9th Cir. 2010) (citing
21 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). However, if the non-

1 moving party lacks support for a necessary element of their claim, the moving
2 party is entitled to judgment as a matter of law regarding that claim. *See Celotex*
3 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

4 In the First Amended Complaint, Plaintiffs allege that Yellow Church Café,
5 LLC is a successor in interest to Ryalex's liabilities. Defendant Yellow Church
6 Café, LLC renews its argument that successor liability does not exist in this case
7 and any of Ryalex's liabilities cannot be transferred to Yellow Church Café, LLC,
8 which did not exist as an entity at the time of Plaintiffs' employment. ECF No. 14
9 at 6; 34.

10 Plaintiffs do not dispute that they were employed at Yellow Church Café by
11 Ryalex, Inc. during the time period of 2010 to 2011. Yellow Church Café and
12 Yellow Church Café, LLC are distinct entities. The limited liability company,
13 Yellow Church Café, LLC, was formed in October 2013, specifically to purchase
14 and operate the Yellow Church Café. In order for Yellow Church Café, LLC to be
15 liable for events that occurred when Ryalex was employing the Plaintiffs, Yellow
16 Church Café, LLC must be a successor in interest to Ryalex's liabilities.

17 Three principle factors bear on the application of successor liability in Title
18 VII cases: "(1) the continuity in operations and work force of the successor and
19 predecessor employers, (2) the notice to the successor employer of its
20 predecessor's legal obligations, and (3) the ability of the predecessor to provide
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1 adequate relief directly.” *Bates v. Pac. Mar. Ass’n*, 744 F.2d 705, 709–10 (9th Cir.
2 1984).

3 The “Asset Purchase and Sale Agreement” for the restaurant was signed by
4 Cathleen C. Wollen, as President for Ryalex, Inc., and Gordon F. Wollen, as Vice
5 President for Ryalex, Inc. ECF No. 16-2 at 10; ECF No. 42-1 at 10. The Sale
6 Agreement specified that the Sellers would “retain all accounts receivable
7 (“AR’s”) due and owing to Seller through October 31, 2013.” ECF No. 16-2 at 1;
8 ECF No. 42-1. In addition, Seller would “be responsible for all accounts payable
9 due and owing through October 31, 2013.” ECF No. 16-2 at 2; ECF No. 42-1 at 2.

10 Yellow Church submitted a declaration from Oscar Guitron, co-owner of
11 Yellow Church Café, LLC, establishing that Yellow Church Café, LLC did not
12 assume any liabilities from Ryalex, Inc., and that neither he nor his wife had any
13 knowledge of Plaintiffs’ claims until after they were served with the complaint in
14 2014. ECF No. 16, Guitron Decl. ¶ 3. Yellow Church Café, LLC also submitted
15 the declaration of Shonda Shawver, the co-owner of Yellow Church Café, LLC,
16 confirming that neither she nor her husband, Oscar Guitron, was aware of
17 Plaintiffs’ lawsuit prior to being served with the complaint in late 2014. ECF No.
18 27, Shawver Decl. ¶ 2.

1 To refute Yellow Church Café, LLC's evidence, Plaintiff Stephanie Chissus
2 submitted a declaration.¹ ECF No. 61. Because Ms. Chissus is appearing pro se,
3 the Court will consider Ms. Chissus's declaration both as evidence, to the extent
4 that she has established a foundation for her statements, and as arguments in
5 opposition to Yellow Church's motion to dismiss.

6 In her declaration, Ms. Chissus establishes that she was the manager of the
7 Yellow Church Café during the time that the Wollens owned the café. ECF No.
8 61, Chissus Decl. ¶ 9. Ms. Chissus further states that in her opinion "that the new
9 owners either did or should have known about the claims, . . ." ECF No. 61,
10 Chissus Decl. ¶ 13. However, Ms. Chissus fails to provide any support for her
11 opinion other than "Ellensburg is a very small community" where "'news travels
12 fast'." ECF No. 61, Chissus Decl. ¶ 14.

13 Ms. Chissus argues that as an experienced chef Mr. Guitron would have
14 conducted due diligence, including investigating past liabilities. ECF No. 61,
15 Chissus Decl. ¶ 17-18. Ms. Chissus also argues that because the same counsel
16 currently represents both Yellow Church Café, LLC and Ryalex and the same
17 counsel represented Mr. Wollens during the EEOC investigation and at the time of
18 the sale of Yellow Church Café to Yellow Church Café, LLC, the Court should

19 ¹ Ms. Chissus's declaration also served as a motion for a continuance, which the
20 Court denied.
21

1 conclude that Yellow Church had notice of Plaintiffs' claims. ECF No. 61, Chissus
2 Decl. ¶ 20.

3 Ms. Chissus also submitted documents that she states that she obtained from
4 the internet regarding setting up businesses generally and a different business
5 allegedly being set up by the owners of Yellow Church Café, LLC. ECF No. 61.
6 The Court will consider the admitted exhibits regarding Mr. Guitron's and Ms.
7 Shawver's application for a business license for a new restaurant, ECF No. 61, but
8 finds that information of no relevance to the current motion. Similarly, the Court
9 finds the exhibit containing information from the internet regarding small business
10 resources of little relevance to the pending motion. *See* ECF No. 61 attachments.

11 Yellow Church Café, LLC, submitted as evidence the Sale Agreement for
12 Yellow Church Café. The "Asset Purchase and Sale Agreement" for the restaurant
13 specified that the Sellers would "retain all accounts receivable ("AR's") due and
14 owing to Seller through October 31, 2013." ECF No. 16-2 at 1; ECF No. 42-1. In
15 addition, Seller would "be responsible for all accounts payable due and owing
16 through October 31, 2013." ECF No. 16-2 at 2; ECF No. 42-1 at 2. This language
17 supports the conclusion that the money flow was disrupted at the time of sale,
18 moving from Ryalex to Yellow Church Café, LLC. This evidence argues against
19 the Plaintiffs' contention that the business continued uninterrupted.

20 Mr. Guitron further states that within a month or so of purchasing the
21 restaurant, most of the employees either quit or were laid off. ECF No. 16, Guitron

1 Decl. ¶ 4. Plaintiffs have not submitted any evidence refuting this contention. The
2 change of employees is another factor that argues against finding that Yellow
3 Church Café continued uninterrupted from when Ryalex, Inc. owned it.

4 Ms. Shawver stated that Yellow Church “changed virtually all of the menu
5 items formerly offered by Ryalex. In fact, there are only three or so items we offer
6 that were previously offered by Ryalex (carrot cake, ‘heavenly loaf’ bread, and the
7 ‘holy moly’ sandwich). And even with these items, we completely changed the
8 recipes for each.” ECF No. 27, Shawver Decl. ¶ 5. Plaintiffs do not dispute that
9 contention. The Court finds that changing the menu items also indicates that the
10 Yellow Church Café did not continue business unaltered when it passed from
11 Ryalex, Inc., ownership to the new owners.

12 Applying the factors under *Bates v. Pac. Mar Ass’n*, 744 F.2d 705, 709-10
13 (9th Cir. 1984), the Court finds that Ms. Chissus’s declaration is insufficient to raise
14 a genuine issue of material fact as to whether Yellow Church Café, LLC has any
15 successor in interest liability regarding Ryalex’s alleged treatment of the Plaintiffs.
16 The first factor is continuity in operations and work force. Yellow Church has
17 submitted sufficient evidence to support that much of the work force changed
18 within a month after the purchase of the restaurant, the accounts receivable and
19 accounts payable did not accrue to the new owner, and much of the menu changed.
20 Therefore, there was no continuity of operations and work force.

1 The second factor is notice to the successor employer of the predecessor's
2 legal obligations. In this case, the admissible evidence shows that neither Mr.
3 Guitron nor Ms. Shawver had any notice of the Plaintiffs' claims until they were
4 served with the complaint in late 2014. In addition, Mr. Guitron testified that
5 Yellow Church Café, LLC, did not assume Ryalex's liabilities.

6 The third factor under *Bates* is the ability of the predecessor to provide
7 adequate relief. Despite Ms. Chissus's declaration and submission of documents,
8 the Court finds that there is insufficient evidence submitted from which the Court
9 can determine whether Ryalex, Inc. has any ability to provide adequate relief.
10 Therefore, that factor is neutral.

11 In conclusion, the Court finds that Yellow Church Café, LLC, has no
12 liability regarding Plaintiffs' Title VII claims as a successor in interest to Ryalex.
13 Yellow Church Café, LLC also argues that it does not qualify as an "employer,"
14 under Title VII. Plaintiffs' Title VII claims require that Plaintiffs establish as an
15 essential element of their prima facie case that Yellow Church is an "employer"
16 within the meaning of Title VII. *Walters v. Metropolitan Ed. Enterprises, Inc.*, 519
17 U.S. 202, 205 (1997). Title VII applies to any employer who "has fifteen or more
18 employees for each working day in each of twenty or more calendar weeks in the
19 current or preceding calendar year." 42 U.S.C. 2000e(b). The court utilizes the
20 payroll method to determine the number of employees the employer "has" for each
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1 working day. *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202,
2 207, 117 S. Ct. 660, 136 L. Ed. 2d 644 (1997).

3 Yellow Church Cafe, LLC argues that it does not employ a sufficient
4 number of employees to meet Title VII's definition of "employer," because shortly
5 after taking over ownership and management of the restaurant, Yellow Church
6 Café, LLC employed less than 15 employees. ECF No. 14 at 9. Mr. Guitron stated
7 that "[w]ithin a month or so after acquiring the restaurant assets from Ryalex, Inc.,
8 Yellow Church Café, LLC, laid off many of Ryalex, Inc.'s former employees,
9 others quit, and the total number of employees was thus reduced to less than fifteen
10 (15), which has since been the case through and including the date of this
11 declaration." ECF No. 16, Guitron Decl. ¶4. Ms. Shawver also confirms that
12 shortly after purchasing the restaurant the number of employees was reduced to
13 less than 15. ECF No. 27, Shawver Decl. ¶ 4.

14 Plaintiffs have provided no evidence to rebut Defendants' evidence or to
15 support the essential element of their prima facie case that Yellow Church Café,
16 LLC, employs a sufficient number of employees to be deemed an "employer"
17 under Title VII. Therefore, the Court finds that Yellow Church, LLC, is not an
18 employer under Title VII, and the Title VII claims against Yellow Church, LLC,
19 are dismissed with prejudice.

20 Yellow Church Café, LLC, argues that if the Court dismisses the Title VII
21 claim, then the Court no longer will have subject matter jurisdiction in this case

1 and should dismiss the state law claims. However, there are still Title VII claims
2 pending against Ryalex, Inc. Therefore, this Court still has subject matter
3 jurisdiction over this entire case until the Title VII claims are resolved against
4 Ryalex. Plaintiffs may proceed against Ryalex on all claims and against Yellow
5 Church Café, LLC, on the state law claims.

6 Accordingly, **IT IS HEREBY ORDERED:**

7 1. Defendant's Motion to Dismiss, **ECF No. 34**, is **GRANTED IN PART**
8 **AND DENIED IN PART.**

9 2. The Title VII claims against Yellow Church Café, LLC, are dismissed
10 with prejudice.

11 3. The Clerk is ordered to enter judgment on the Title VII claims, only, in
12 favor of Yellow Church Café, LLC.

13 The District Court Clerk is directed to enter this Order and provide copies to
14 counsel and pro se Plaintiffs.

15 **DATED** this 26th day of September 2016.

16
17 s/ Rosanna Malouf Peterson
18 ROSANNA MALOUF PETERSON
19 United States District Judge
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21